

THE CHILL BILL: THE HATE CRIMES PREVENTION ACT OF 2007 AND THE FORGOTTEN DANGERS TO THE FIRST AMENDMENT

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I. INTRODUCTION

Not since its decision in *Wisconsin v. Mitchell*, has the United States Supreme Court squarely addressed whether hate crimes legislation regulates protected speech in violation of the First Amendment.¹ However, the United States House of Representatives' passage of the Local Law Enforcement Hate Crimes Prevention Act of 2007 ("House Bill 1592" or "Hate Crimes Prevention Act of 2007") on May 3, 2007 reignited the debate over the First Amendment implications of hate crimes legislation.² The bill represented the most ambitious federal criminal civil rights legislation in nearly forty years.³ The Hate Crimes Prevention Act of 2007 essentially aimed to expand the Violent Crime Control and Law Enforcement Act of 1994 to proscribe crimes motivated by bias based on gender identity, sexual orientation, and disability.⁴ House Bill 1592 in relevant part designated a hate crime as "willfully caus[ing] bodily injury to any person... because of the actual or

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1. See *Wisconsin v. Mitchell*, 508 U.S. 476, 479, 490 (1993) (holding that defendant's "First Amendment rights were not violated by the application of the Wisconsin's penalty-enhancement provision" which enhanced punishment because defendant intentionally selected his victim based on race).

2. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (as passed by House, May 3, 2007); David Stout, *House Votes to Expand Hate-Crime Protection*, N.Y. TIMES, May 4, 2007, at A19, available at <http://www.nytimes.com/2007/05/04/washington/04hate.html>.

3. Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 STAN. L. & POL'Y REV. 251, 252 (2008).

4. See Christopher DiPompeo, *Federal Hate Crime Laws and United States v. Lopez: On A Collision Course to Clarify Jurisdictional-Element Analysis*, 157 U. PA. L. REV. 617, 630 (2008); see also H.R. 1592, § 6(a).

perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person....”⁵ The proposed legislation provided for enhanced sentencing for anyone convicted of committing such a bias crime against a member of the enumerated protected groups.⁶ In addition, the bill would excise the language in the Violent Crime Control and Law Enforcement Act of 1994 that limited the operation of the act to those persons engaged in federally protected activity, such as voting or attending school.⁷ The proposed legislation, therefore, would vastly expand the application of penalty enhancement for bias crimes.

Lawmakers and commentators expressed concern about the First Amendment implications of the bill.⁸ Some argued that the proposed statute threatened the freedom of religious leaders to publicly condemn homosexuality.⁹ Representative Louie Gohmert admonished the act and argued that read in conjunction with federal statutes providing for accomplice liability, the act would mean:

If a... religious leader teaches or preaches that homosexuality is wrong or is a sin or someone in the leader’s flock commits a crime against a person who practices such act, that religious leader may have counseled

5. H.R. 1592, § 6(a).

6. *Id.*

7. Stout, *supra* note 2.

8. *E.g.*, H.R. REP. NO. 110-113, at 40–41 (2007). Representatives Lamar Smith, Steve Chabot, Chris Cannon, Ric Keller, Mike Pence, Tom Feeney, Trent Franks, and Jim Jordan all joined in registering their dissenting views in the House Judiciary Committee report on House Bill 1592. *Id.* at 49; *see also* *Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing on H.R. 1592 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 72 (2007) [hereinafter *Hearing on H.R. 1592*] (statement of Brad W. Dacus, President, Pac. Justice Inst.); Oren Dorell, *Ministers Say Hate Crimes Act Could Muzzle Them; Bill’s Backers Say It Targets Anti-Gay Crime, Not Words*, USA TODAY, June 15, 2007, at 7A, available at http://www.usatoday.com/news/religion/2007-06-15-hate-crimes_N.htm; Barbara Karkabi, *Hate-Crimes Legislation Stirs Pulpit and Podium; Senate-Bill Controversy Centers Mostly on Gender Identity, Sexual orientation*, Hous. CHRON., Sept. 1, 2007, at 1.

9. *E.g.*, H.R. REP. NO. 110-113, at 39 (2007). The dissenting view in the House Judiciary Committee Report on House Bill 1592 warned:

[T]he bill raises the possibility that religious leaders or members of religious groups could be prosecuted criminally based on their speech or protected activities under conspiracy law or section 2 of title 18, which makes criminally liable any person who aids, abets, counsels, commands, induces or procures the commission of the crime It is easy to imagine a situation in which a prosecutor may seek to link ‘hateful speech’ to causing hateful violent acts. A chilling effect on religious leaders and others who express their beliefs will unfortunately result.

Id.

or induced under the argument and someday someone will say so and ministers will be arrested for their preaching.¹⁰

Others feared that the gathering of evidence necessary to prove that a particular defendant was motivated by bias threatened individuals' expression or their entertainment of certain views.¹¹ Timothy Lynch of the Cato Institute argued:

[O]nce hate crime laws are on the books, the law enforcement apparatus of the state will be delving into the accused's life and thoughts in order to show that he or she was motivated by bigotry. What kind of books and magazines were found in the home? What internet sites were bookmarked in the computer? Friends and co-workers will be interviewed to discern the accused's politics and worldview.¹²

Conversely, some argued that such reactions by opponents of House Bill 1592 were alarmist and misplaced.¹³ At least one supporter of

10. *Hearing on H.R. 1592, supra* note 8, at 4 (statement of Rep. Louie Gohmert, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.).

11. *E.g.*, H.R. REP. NO. 110-113, at 41 (2007). The dissenting view in the House Judiciary Committee Report on House Bill 1592 warned:

[I]n prosecuting an individual for a hate crime, it may be necessary to seek testimony relating to the offender's thought process to establish his motivation to attack a person out of hatred of a particular group. Members of an organization or a religious group may be called as witnesses to provide testimony as to ideas that may have influenced the defendant's thoughts or motivation for his crimes, thereby expanding the focus of an investigation to include ideas that may have influenced a person to commit a crime of violence.

Id.

12. *Hearing on H.R. 1592, supra* note 8, at 36 (statement of Timothy Lynch, Dir., Project on Criminal Justice, CATO Inst.).

13. *See, e.g.*, H.R. REP. NO. 110-113, at 15-17 (2007). The House Judiciary Committee Report on House Bill 1592 dismisses the danger of the chilling effect, stating:

H.R. 1592 is carefully crafted so as to distinguish crimes of violence based on bias from religious or other expression protected under the first amendment [N]ew section 249(d) prohibits introducing evidence of association or expression to prove that a crime has been committed, unless it specifically relates to the offense [D]oubts about the constitutionality of hate crimes laws were squarely addressed by the Supreme Court in the early 1990's in two cases, *R.A.V. v. City of St. Paul* and *Wisconsin v. Mitchell*. In *Wisconsin v. Mitchell*, the Supreme Court made clear that the first amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. These cases clearly demonstrate that a hate crimes statute may consider bias motivation when that motivation is directly connected to a defendant's criminal conduct. By requiring this connection to criminal activity, this legislation does not chill protected speech and does not violate the first amendment.

House Bill 1592 responded that federal accomplice and conspiracy law contains safeguards protecting free expression. Dean Frederick M. Lawrence posited:

And the concern that had been raised earlier with respect to complicity, what about those who give speeches that others may rely on? Complicity is a well-known doctrine in the criminal law that requires an intent to see the crime happen.

There will be no punishment under this statute or any statute for someone expressing views. There will certainly be the potential for punishment for someone who acts with the intent to see a bias crime happen, and there should be.¹⁴

Moreover, he argued, “Properly understood, bias crime laws punish motivation no more than do criminal proscriptions generally.”¹⁵ Severity of the penalty often depends on the reprehensibility of a particular defendant’s motive.¹⁶ Dean Lawrence also suggested that the United States Supreme Court’s holding in *Wisconsin v. Mitchell*, classifying penalty enhancement for bias-motivated crimes as permissible regulation of non-expressive conduct,¹⁷ foreclosed any First Amendment objection to the Hate Crimes Prevention Act of 2007.¹⁸ Professor Geoffrey R. Stone dismissed religious leaders’ fears as “fanciful” because the legislation “would prohibit only the infliction of bodily harm and attempts to cause bodily harm” and not “attempts to

Id.; see also *Hearing on H.R. 1592*, *supra* note 8, at 40 (statement of Frederick M. Lawrence, Dean, George Washington Univ. Law Sch.) (arguing that limits on accomplice liability mitigate any chilling effect on religious leaders’ preaching against homosexuality). Frederick Lawrence is the author of *Punishing Hate: Bias Crimes Under American Law*, which examines bias-motivated violence in the United States. See generally, FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (1999).

14. *Hearing on H.R. 1592*, *supra* note 8, at 40 (statement of Frederick M. Lawrence, Dean, George Washington Univ. Law Sch.).

15. Lawrence, *supra* note 3, at 261. Similarly, Congressman Jerrold Nadler argued:

Let us be clear: This is not an issue of free speech. What is covered here are criminal acts in which the victim is actually harmed and is selected because of his or her status. The law routinely looks to the motivation of a crime and treats the more heinous of them differently.

Hearing on H.R. 1592, *supra* note 8, at 2 (statement of Rep. Jerrold Nadler, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.). The Attorney General of Utah, Mark L. Shurtleff, also pointed out that penalties frequently depend on the reprehensibility of the motive behind the crime. *Id.* at 25 (statement of Mark L. Shurtleff, Att’y Gen., Utah).

16. See *supra* note 15 and accompanying text.

17. See *supra* note 1 and accompanying text.

18. Lawrence, *supra* note 3, at 269–70.

incite.”¹⁹ The Attorney General of Utah, Mark L. Shurtleff, also dismissed fears that prior speech and associations would constitute evidence of motive at a prosecution:

[The proposed legislation] specifically states in the rules of evidence that prosecutors cannot use evidence of expression, of their associations. They may belong to hate groups, they may have actually written things regarding their hatred toward certain groups, but we have to be able to use those as exact evidence of the crime and the evidence specifically relates to the crime.²⁰

Thus, proponents of the bill pointed to numerous safeguards that would insulate protected expression from the looming chilling effect that critics feared.

The 110th Congress ultimately failed to enact the proposed legislation owing to strong opposition from religious conservatives and antiwar Democrats.²¹ However, President Obama has identified strengthening federal hate crimes as a priority of the new administration.²² Indeed, the 111th Congress’s House recently passed House Bill 1913, which revives the proposed hate crime legislation in almost the exact language, and referred the bill to the Senate.²³ Therefore, debate on the First Amendment implications of the Hate Crimes Prevention Act will continue. This comment will address whether the Hate Crimes Prevention Act is unconstitutionally overbroad

19. Geoffrey R. Stone, *The Gospel and Hate Crimes*, L.A. TIMES, Aug. 23, 2007, at A25.

20. *Hearing on H.R. 1592, supra* note 8, at 114 (statement of Mark L. Shurtleff, Att’y Gen., Utah).

21. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (as referred to the Senate Committee on the Judiciary, May 7, 2007); Carl Hulse, *Congressional Maneuvering Dooms Hate Crime Measure*, N.Y. TIMES, Dec. 7, 2007, at A26, available at <http://www.nytimes.com/2007/12/07/washington/07hate.html?scp=3&sq=%22Matthew%20Shepard%20Act%22&st=cse>; Library of Congress, H.R.1592: All Actions, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01592:@@X> (last visited Nov. 30, 2009) (showing that House Bill 1592 was left in the Senate Committee on the Judiciary). Even in the face of strong Congressional support for the bill, President Bush threatened to veto the bill if it passed. See OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: H.R. 1592—LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (May 3, 2007). Congressional Democrats attempted to secure the passage of the bill by including it as an amendment to a “must-pass” defense authorization bill. 153 CONG. REC. S12,200 (2007) (statement of Sen. Hatch). However, the combined opposition of conservatives to the Hate Crimes Prevention Act and of antiwar liberals to the Iraq War doomed the passage of the bill. Hulse, *supra*; see also Editorial, *Caving in on Hate Crimes*, N.Y. TIMES, Dec. 10, 2007, at A22.

22. WhiteHouse.gov, Issues: Civil Rights, <http://www.whitehouse.gov/issues/civil-rights> (last visited Nov. 30, 2009).

23. Local Law Enforcement Hate Crimes Prevention Act of 2009, H.R. 1913, 111th Cong. (as referred to the Senate Committee on the Judiciary, Apr. 30, 2009); Local Law Enforcement Hate Crimes Prevention Act of 2009, H.R. 1913, 111th Cong. (as passed by House, Apr. 29, 2009).

in violation of the First Amendment because it threatens to chill protected speech. Part II will outline the text of the House Bill 1592 as passed by the House of Representatives.²⁴ Part III will outline the United States Supreme Court's overbreadth doctrine in its current form and the Supreme Court's major decisions on hate crime legislation in the past. Part IV will evaluate the potential dangers that the Act, in its current form, poses to protected speech. Ultimately, this comment concludes that Congress can draft hate crimes legislation to avoid chilling protected speech; however, lawmakers and legal commentators have been overly dismissive of the threats that the Act poses in its current form.

II. TEXT OF THE HATE CRIMES PREVENTION ACT OF 2007

The drafters of House Bill 1592 attempt to preempt First Amendment objections by creating a buffer zone for protected expression. The bill purportedly limits the punishable offense to criminally violent conduct that "willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person...."²⁵ Thus, superficially at least, the proposed legislation extends only to unprotected conduct—physically harming or attempting to harm another person.²⁶ However, the language limits the application of the penalty enhancement provision to crimes motivated by the "actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability" of the victim.²⁷ Motive constitutes the key element of the offense.²⁸ Therefore, the language essentially requires federal prosecutors to gather and introduce evidence on the defendant's

24. Since the language of House Bill 1913 incorporates the language from House Bill 1592, this analysis is relevant to the current debate before Congress. See *supra* note 23 and accompanying text; compare Local Law Enforcement Hate Crimes Prevention Act of 2009, H.R. 1913, 111th Cong. (as referred to the Senate Committee on the Judiciary, Apr. 30, 2009), with Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (as passed by House, May 3, 2007).

25. H.R. 1592, § 6(a). The Supreme Court of the United States has repeatedly emphasized that violence or other types of expressive conduct receives no First Amendment protection when it results in harm independent from the impact of the message. *E.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984)).

26. See H.R. 1592, § 6(a); cf. *Mitchell*, 508 U.S. at 484 ("[O]ur cases reject the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.") (internal citations and quotations omitted).

27. H.R. 1592, § 6(a).

28. See *id.*

mental state.²⁹ Critics of the proposal fear this motive element will necessitate intrusive investigations into defendants' prior speech or entertainment of ideas about protected groups.³⁰ Such critics fear that the unavoidable introduction of such evidence could chill protected speech about the immorality of homosexual behavior by inducing self-censorship.³¹ In other words, individuals might eschew engaging in such protected speech for fear that it could be used against them if they are charged with a hate crime in the future.³² The bill, however, contains several provisions designed to mitigate this constitutional objection.

House Bill 1592 contains a "Rule of Evidence" provision stating, "In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense."³³ Supporters of the bill argue that this provision mitigates the danger of the chilling effect by prohibiting the introduction of defendants' statements or associations that are remote in relation to the criminal act.³⁴ However, the practical effect of this provision depends largely on judicial construction of the phrase "specifically relates to that offense."³⁵ Courts could read the phrase to mean that only expressions with a close temporal and spatial proximity to the criminal act may be introduced to prove motive. Under that reading, epithets or bigoted statements made during or just prior to the violent act would be admissible. On the other hand, courts could interpret the phrase as

29. *Id.* In addition, any prosecution under the act must be based on "reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person was a motivating factor underlying the alleged conduct of the defendant" *Id.*

30. *Hearing on H.R. 1592, supra* note 8, at 36 (statement of Timothy Lynch, Dir., Project on Criminal Justice, CATO Inst.); H.R. REP. NO. 110-113, at 41 (2007) ("For example, in prosecuting an individual for a hate crime, it may be necessary to seek testimony relating to the offender's thought process to establish his motivation to attack a person out of hatred of a particular group. Members of an organization or a religious group may be called as witnesses to provide testimony as to ideas that may have influenced the defendant's thoughts or motivation for his crimes, thereby expanding the focus of an investigation to include ideas that may have influenced a person to commit an act of violence. Such groups or religious organizations may be chilled from expressing their ideas out of fear of involvement in the criminal process.")

31. *See* H.R. REP. NO. 110-113, at 41 (2007).

32. *See id.* at 41 ("Ultimately, a pastor's sermon concerning religious beliefs and teachings could be considered to cause violence and will be punished or at least investigated Religious teachings and common beliefs will fall under government scrutiny, chilling every American's right to worship in the manner they choose and to express their religious beliefs.").

33. H.R. 1592, § 6(a).

34. *E.g., Hearing on H.R. 1592, supra* note 8, at 114 (statement of Mark L. Shurtleff, Att'y Gen., Utah); Lawrence, *supra* note 3, at 270.

35. H.R. 1592, § 6(a).

simply requiring that statements must relate to the particular victim's protected group to be admissible. Under that reading, remote ideological statements and associations that reflect antipathy toward a particular group would be admissible. Therefore, the scope and efficacy of this protective mechanism remains unclear.³⁶

In addition, the bill contains a "Rule of Construction" provision providing, "Nothing in this Act... shall be construed to prohibit any expressive conduct protected from legal prohibition by, or any activities protected by the free speech or free exercise clauses of, the First Amendment to the Constitution."³⁷ Supporters have, likewise, pointed to this provision as insulating protected expression on the immorality of homosexual behavior from prosecution.³⁸ However, such arguments are somewhat spurious. The potential danger to the First Amendment derives not so much from the bill's direct prohibition of protected expression, but from the danger of self-censorship induced by the prospective introduction of evidence to prove motive for criminal conduct.³⁹ Thus, the bill's overbreadth depends on the scope of protected expression that prosecutors may introduce at trial to prove motive.⁴⁰ The United States Supreme Court's current First Amendment overbreadth jurisprudence and the Court's hate crimes decisions provide an instructive starting point in considering this issue because they proscribe constitutional boundaries for regulations that affect protected expression.

III. THE SUPREME COURT'S JURISPRUDENCE

A. The Overbreadth Doctrine

The First Amendment overbreadth doctrine "vindicate[s] the precision principle"—the requirement that government regulation of speech be designed to attain a permissible end and not infringe more

36. *But see* Lawrence, *supra* note 3, at 270 (arguing that the United States Supreme Court's jurisprudence does not require the "Rule of Evidence" limitation for the Hate Crimes Prevention Act to be constitutional).

37. H.R. 1592, § 8.

38. *E.g.*, Stone, *supra* note 19 (arguing that this provision provides additional protection for freedom of speech and religion, disposing of fears that the proposed legislation will criminalize preaching against homosexuality); *see also* H.R. REP. NO. 110-113, at 15-16 (2007).

39. *See* H.R. REP. NO. 110-113, at 41 (2007).

40. *See supra* notes 33-36 and accompanying text.

protected speech than necessary.⁴¹ The underlying policy of the overbreadth doctrine supposes that sweeping regulations of speech deters protected expression because speakers fear they will fall within the restriction and be subject to criminal penalty.⁴² In *Broadrick v. Oklahoma*, the Supreme Court of the United States held that a person prosecuted for unprotected expression under a permissible regulation may still claim facial overbreadth and challenge the law on its face because “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted....”⁴³ The Court has generally applied the overbreadth doctrine to strike down a law when it determines that the “law has no ‘core’ of applications that are legitimate under the First Amendment....”⁴⁴ In *Broadrick*, the Court stated that it would find overbroad laws facially unconstitutional “unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.”⁴⁵ However, the Court emphasized that the facial overbreadth doctrine attenuates as the regulation moves away from pure speech toward conduct.⁴⁶ The Court also emphasized that the overbreadth must be substantial to justify facial invalidation of the statute.⁴⁷

In subsequent cases, the Court refined the *Broadrick* principles into a more coherent analysis. The Court held, in *City of Houston v. Hill*, that the initial task is to determine whether the statute “‘reaches a substantial amount of constitutionally protected conduct.’”⁴⁸ Laws that reach a substantial amount of protected expression or conduct may be facially invalidated, notwithstanding particular lawful applications.⁴⁹ However, the Court cautioned that single possible or hypothetical instances of frustration of protected speech would not sustain a facial challenge.⁵⁰ The Court’s holdings in *Broadrick* and *Hill* have limited application to the Hate Crimes Prevention Act. The core application

41. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 3.06[1] (1994).

42. *Id.* § 3.06[2][a]; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853 (1970).

43. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

44. SMOLLA, *supra* note 41, § 3.06[2][b][ii].

45. *Broadrick*, 413 U.S. at 613.

46. *Id.* at 615.

47. *Id.*

48. *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)).

49. *Id.* at 459.

50. *Id.* at 458.

of the statute in *Broadrick* imposed neutral time, place, and manner restrictions on political speech.⁵¹ In *Hill*, the core application of the statute, which prohibited all speech that interrupted a police officer in any manner, constituted impermissible regulation of protected speech.⁵² The Hate Crimes Prevention Act of 2007 poses a more difficult overbreadth question because at its core it applies to unprotected conduct—the infliction of bodily harm.⁵³ However, the Act necessitates the use of speech as evidence to prove bias motive.⁵⁴ Therefore, the proposed legislation has a legitimate core application, and the danger of overbreadth is more subtle. The Court’s major decisions on the constitutionality of hate crimes legislation may prove more instructive because they address statutes with core applications similar to those of House Bill 1592. These decisions define the overbreadth analysis as applied to penalty enhancement statutes.

B. The United States Supreme Court’s Hate Crime Jurisprudence

1. *R. A. V. v. City of St. Paul*

The Court’s initial consideration of hate crimes statutes seemed to signal disapproval of such regulations as a direct content restriction on protected expression. In *R. A. V. v. City of St. Paul*, the Court considered whether St. Paul’s Bias-Motivated Crime Ordinance violated the First Amendment.⁵⁵ The ordinance provided, “‘Whoever places on public or private property a symbol, object, appellation, characterization or graffiti... which... [he] has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.’”⁵⁶ The city charged the petitioner under the ordinance for burning a cross in a yard across the street where an African American family lived.⁵⁷ The petitioner moved to dismiss the charge on the ground that the ordinance constituted an invalid content restriction

51. *Broadrick*, 413 U.S. at 616–17. The statute at issue in *Broadrick* prohibited certain classes of government employees from engaging in any kind of political campaigning. *Id.* Therefore, it was not censorial of particular viewpoints in violation of the First Amendment. *See id.* at 616–18.

52. *Hill*, 482 U.S. at 462–63 (finding that since the statute prohibited all speech that interrupted an on-duty police officer in any manner, it was directed at constitutionally protected speech).

53. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6(a) (as passed by House, May 3, 2007).

54. *Id.*

55. *R. A. V. v. City of St. Paul*, 505 U.S. 377, 380 (1992).

56. *Id.* (quoting ST. PAUL, MINN., STAT. § 292.02 (1990)).

57. *Id.* at 379.

in violation of the First Amendment.⁵⁸ The Supreme Court of Minnesota sought to save the ordinance by construing its application to only expressive conduct that amounts to fighting words.⁵⁹ Accepting that construction as authoritative, the Supreme Court of the United States proceeded to consider the constitutionality of the ordinance as construed by the Supreme Court of Minnesota.⁶⁰

The Supreme Court of the United States held the St. Paul ordinance facially unconstitutional as a content-based restriction on protected expression.⁶¹ The Court prefaced that the First Amendment as a general rule prohibits government from criminalizing speech based on nothing more than disapproval of its content.⁶² However, government may impose content-based restrictions on certain discrete categories of speech, such as fighting words, “*because of their constitutionally proscribable content...*”⁶³ Nevertheless, government cannot prohibit only certain types of fighting words based on content unrelated to the overall proscribable content.⁶⁴ In other words, while government can prohibit fighting words, it cannot do so based on disapproval of the underlying ideas communicated through such speech.⁶⁵ Within the proscribable category of fighting words, government cannot discriminate on the basis of content.⁶⁶ The St. Paul ordinance singled out only fighting words expressing bias on the basis of race, gender, or religion, essentially silencing certain select ideas.⁶⁷ In sum, prohibitions within proscribable categories of speech cannot suppress particular messages based on content, because such prohibition constitutes viewpoint discrimination in violation of the First Amendment.⁶⁸

The Hate Crimes Prevention Act of 2007 does not run afoul of *R. A.*

58. *Id.* at 380.

59. See *In re Welfare of R. A. V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev'd sub nom.* *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992).

60. *R. A. V.*, 505 U.S. at 381.

61. *Id.* (“[W]e nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”)

62. *Id.* at 382.

63. *Id.* at 383 (emphasis in original). The Court, however, dismissed the theory that categories such as fighting words did not constitute speech at all and instead adopted the notion that such categories present exceptions to the general rule that government may not proscribe speech based on disapproval of the content. *Id.* at 383–84. These categories are proscribable under the First Amendment precisely because of the content. *Id.*

64. *Id.*

65. *Id.* at 386.

66. *Id.* at 384.

67. *Id.* at 393–94.

68. *Id.* at 392.

V. so long as it is construed as a restriction on entirely unprotected conduct rather than as a restriction on a proscribable category of speech.⁶⁹ Thus, its supporters have repeatedly argued that the Act regulates criminal conduct.⁷⁰ However, at least one commentator has argued that penalty enhancement statutes constitute direct regulation on bigoted expression based on nothing more than disapproval of such expression.⁷¹ Such a restriction runs afoul against *R. A. V.*⁷²

2. *Wisconsin v. Mitchell*

In *Wisconsin v. Mitchell*, the Court addressed the constitutionality of a Wisconsin hate crimes statute containing a penalty enhancement provision for crimes motivated by bias.⁷³ The facts of the case are particularly instructive because they illustrate the typical instance in which the Hate Crimes Prevention Act would apply. A group of young African American males, including the defendant, Mitchell, had gathered outside an apartment complex and were discussing the movie “Mississippi Burning.”⁷⁴ After discussing a scene from the movie in which a Caucasian man assaults an African American boy, Mitchell asked the emotionally charged group, “Do you all feel hyped up to move on some white people?”⁷⁵ Subsequently, the group spotted a young Caucasian male walking.⁷⁶ Mitchell then stated, “You all want to fuck somebody up? There goes a white boy; go get him.”⁷⁷ The group approached the Caucasian male and severely beat him, leaving him in a

69. See H.R. REP. NO. 110-113, at 16–17 (2007) (“[D]oubts about the constitutionality of hate crimes laws were squarely addressed by the Supreme Court in the early 1990’s in . . . *R. A. V. v. City of St. Paul* [This] case[] clearly demonstrate[s] that a hate crimes statute may consider bias motivation when that motivation is directly connected to a defendant’s criminal conduct. By requiring this connection to criminal activity, this legislation does not chill protected speech and does not violate the first amendment.”).

70. *Id.* at 15 (“H.R. 1592 is carefully crafted so as to distinguish crimes of violence based on bias from religious or other expression protected under the first amendment. The legislation does not prohibit name-calling, verbal abuse, or other forms of negative or hateful expression; it prohibits only violent actions that result in death or bodily injury.”); see also *Hearing on H.R. 1592, supra* note 8, at 2 (statement of Rep. Jerrold Nadler, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.) (“Let us be clear: This is not an issue of free speech. What is covered here are criminal acts in which the victim is actually harmed and is selected because of his or her status.”).

71. Steven G. Gey, *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1040 (1997); see *infra* Part IV.A.

72. See *supra* notes 64–66 and accompanying text.

73. *Wisconsin v. Mitchell*, 508 U.S. 476, 479–80 (1993).

74. *Id.*

75. *Id.* at 480.

76. *Id.*

77. *Id.*

coma for four days.⁷⁸ A jury convicted Mitchell of aggravated battery which, by Wisconsin statute, normally carried a maximum sentence of two years' imprisonment.⁷⁹ However, the jury found that Mitchell had intentionally selected the victim on the basis of race.⁸⁰ Section 939.645 of the Wisconsin Statutes allowed enhancement of penalties for certain crimes when "the defendant '[i]ntentionally selects the person against whom the crime... is committed... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person....'"⁸¹ Under section 939.645, Mitchell could be sentenced to a maximum of seven years' imprisonment, and the circuit court imposed a sentence of four years' imprisonment.⁸² Similar to House Bill 1592, the Wisconsin statute provided for enhanced penalties based on motive and included sexual orientation in the enumeration of protected groups.⁸³ However, unlike House Bill 1592, the Wisconsin statute was not limited to crimes of "bodily injury" but encompassed property crimes as well.⁸⁴ Mitchell appealed his conviction, arguing that the penalty enhancement provision violated the First Amendment.⁸⁵

The Supreme Court of Wisconsin reversed Mitchell's conviction, holding that the Wisconsin hate crimes penalty enhancement "violate[d] the First Amendment *directly* by punishing what the legislature ha[d] deemed to be offensive thought."⁸⁶ Rejecting the State's argument that the statute merely punished conduct—the actual selection of the victim—the court found that the statute punished the reason for the selection, essentially punishing bigoted thought.⁸⁷ In addition, the court held that the statute was overbroad because the prosecution would have to introduce evidence of prior protected speech, such as racial epithets, that the defendant may have used well before the actual offense.⁸⁸ The use of such evidence threatened to chill the speech

78. *Id.*

79. *Id.* (citing WIS. STAT. §§ 939.50(3)(e), 940.19(1m) (1989–90)).

80. *Id.*

81. *Id.* (quoting WIS. STAT. § 939.645(1)(b) (1989–90)).

82. *Id.* at 480–81 & n.1 (citing WIS. STAT. § 939.645(2)(c) (1989–90)).

83. Compare Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6(a) (as passed by House, May 3, 2007), with WIS. STAT. § 939.645 (1989–90).

84. Compare Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6(a) (as passed by House, May 3, 2007), with WIS. STAT. § 939.645(1)(b) (1989–90).

85. *Mitchell*, 508 U.S. at 481.

86. *State v. Mitchell*, 485 N.W.2d 807, 811 (Wis. 1992), *rev'd* 508 U.S. 476 (1993) (emphasis added).

87. *Id.* at 812, 815. In reaching this conclusion, the Supreme Court of Wisconsin relied on the United States Supreme Court's recent decision in *R. A. V. v. City of St. Paul*, which held that state and local governments could not impose content restrictions on bigoted speech. *Id.* at 814–15; see *supra* Part III.B.1.

88. *Mitchell*, 485 N.W.2d at 816.

of those who feared future prosecution under any of the prescribed offenses.⁸⁹ The court, thus, based its holding on reasoning strikingly similar to that of House Bill 1592's critics.⁹⁰

Chief Justice Rehnquist delivered a brief opinion for a unanimous Court.⁹¹ The Court initially recognized that, strictly construed, the Wisconsin statute punished only conduct.⁹² Moreover, the Court recognized that the First Amendment does not protect certain types of conduct, such as physical violence, that inflicts direct harm independent of the communicative impact of the message.⁹³ However, the Court acknowledged that this rule did not dispose of Mitchell's First Amendment challenge.⁹⁴ The statute punished conduct more severely based on the defendant's motive and viewpoint.⁹⁵ Therefore, the statute encompassed not only pure conduct, but also an expressive element connected to the defendant's mental state.⁹⁶ The Court observed, however, that courts traditionally consider the defendant's motive for committing an offense as one crucial sentencing factor among others.⁹⁷ Therefore, the statute did not differ substantially from sentencing enhancements under substantive criminal law.⁹⁸ While a sentencing judge cannot consider a defendant's abstract beliefs, he may consider the motive underlying the offense in question.⁹⁹ The Court noted that the

89. *Id.*

90. H.R. REP. NO. 110-113, at 39-41 (2007).

91. *Wisconsin v. Mitchell*, 508 U.S. 476, 477, 479 (1993).

92. *Id.* at 484.

93. *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984); *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

94. *Id.*

95. *Id.* at 485.

96. *Id.*

97. *Id.*

98. *See id.* at 485-86.

99. *Id.* (citing *Dawson v. Delaware*, 503 U.S. 159, 167 (1992)). In *Dawson*, the defendant, Dawson, escaped from prison, burglarized a house, brutally murdered the resident, and stole the resident's car. *Dawson*, 503 U.S. at 160-61. A jury convicted Dawson of first-degree murder. *Id.* at 161. At the penalty stage of his trial, the prosecution introduced evidence that Dawson was a member of the Aryan Brotherhood and submitted his white supremacist tattoos as proof. *Id.* at 161-62. Subsequently, Dawson challenged the admission of this evidence on First Amendment grounds. *Id.* at 160. The Court held that the sentencing judge could not consider evidence of Dawson's membership in a white supremacist group because it proved only his abstract beliefs. *Id.* at 165-66. The Court held that the introduction of this evidence violated Dawson's First Amendment rights. *Id.* at 165-68. While the prosecution could introduce a wide range of evidence at sentencing, Dawson's association with the Aryan Brotherhood had no relevance to the substantive crime. *Id.* at 165-66. This evidence was inadmissible on First Amendment grounds because there was no indication that bias toward a certain identifiable group motivated Dawson to commit the murder. *Id.* Therefore, the Court essentially articulated a relevance test for determining whether evidence of association at the penalty phase violated the First Amendment. *See id.* Evidence of abstract beliefs as opposed to motive for a particular act ran afoul of the First Amendment. *See id.*

First Amendment does not prohibit the evidentiary use of speech to prove motive.¹⁰⁰ On the contrary, the use of prior statements to prove motive and intent is common practice.¹⁰¹ In addition, the Court noted that the penalty enhancement statute operates in the same fashion as federal antidiscrimination laws.¹⁰² The Court concluded that the statute proscribed bias-inspired conduct and not speech.¹⁰³ Thus, the Court disposed of the argument that the statute directly regulated speech.¹⁰⁴ The substantive criminal offense punishing actual conduct subsumed the penalty enhancing statute.¹⁰⁵ The Court, thus, implied that the statute required a close nexus between bias motivation and the substantive conduct offense.¹⁰⁶

The Court then proceeded to consider whether the Wisconsin statute was overbroad due to its chilling effect on protected bigoted speech.¹⁰⁷ This challenge to the statute posited that the statute would induce self-censorship by individuals who feared penalty enhancement if they might commit one of the substantive offenses proscribed by the statute.¹⁰⁸ The possibility that their past speech and associations could result in a stiffer penalty would deter them from expressing bigoted ideas protected by the First Amendment.¹⁰⁹ The Court swiftly dismissed this argument, reasoning, “The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional ‘overbreadth’ cases.”¹¹⁰ The idea that a citizen would suppress his unpopular ideas for fear that he might later commit a serious crime was simply too hypothetical to justify a finding of overbreadth.¹¹¹ Implicit in the Court’s dismissal of the overbreadth argument was the fact that the penalty enhancement

100. *Mitchell*, 508 U.S. at 489.

101. *Id.*

102. *Id.* at 487. “Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee ‘because of such individual’s race, color, religion, sex, or national origin.’” *Id.* (quoting 42 U.S.C. § 2000e-(a)(1) (2006)) (emphasis in original).

103. *Id.* at 487–88. The Court distinguished its recent decision in *R. A. V.* by emphasizing that the statute in the *R. A. V.* case regulated pure speech. *Id.* at 487 (citing *R. A. V. v. City of St. Paul*, 505 U.S. 377, 392–94 (1992)).

104. *See id.* at 487–88.

105. *See id.* at 484–88.

106. Lawrence, *supra* note 3, at 267 (“The Court then held that, because the bias motivation would have to have a close nexus with the specific criminal act, there was little risk that the statute would chill protected bigoted speech. The statute focused not on the defendant’s bigoted ideas, but rather on his actions based on those ideas.”); *see also*, Stone, *supra* note 19.

107. *Mitchell*, 508 U.S. at 488.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 488–89.

would only come into play in the context of serious offenses, and the possibility of committing a serious offense was too remote and improbable to work any real chilling effect.¹¹² Moreover, because the statute required a nexus between bias-motivation and the criminal act, any chilling effect on protected speech would be minimal.¹¹³ Thus, the Court concluded that the penalty enhancement provision did not violate any of Mitchell's First Amendment rights.¹¹⁴

Supporters of the Hate Crimes Prevention Act of 2007 frequently cite to *Mitchell* as foreclosing further debate on whether such penalty enhancements for hate crimes violate the First Amendment.¹¹⁵ They argue that *Mitchell* authoritatively establishes that the introduction of expression to prove bias motive does not chill protected expression.¹¹⁶ However, the Court's brief disposal of the issues in *Mitchell* fails to adequately address important First Amendment concerns and contains critical theoretical flaws.¹¹⁷ Most crucially, the Court underestimated the true potential of penalty enhancement provisions to chill protected expression.¹¹⁸

3. *Virginia v. Black*

Unlike *Mitchell*, the Court's more recent decision in *Virginia v. Black* did not address the constitutionality of a penalty enhancement statute for bias-motivated crimes. Rather, *Black* considered a First Amendment challenge to Virginia's statute banning cross-burning with the intent to intimidate.¹¹⁹ Although the statute at issue was a content restriction as opposed to a penalty enhancement provision,¹²⁰ the case provides important insight on two levels. First, the Court again considered a hate crime with a motive element implicating the First Amendment.¹²¹

112. *See id.*

113. *See id.* at 489–90.

114. *Id.* at 490.

115. *E.g.*, H.R. REP. NO. 110-113, at 17 (2007) (“In *Wisconsin v. Mitchell*, the Supreme Court made clear that the first amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Th[is] case[] clearly demonstrate[s] that a hate crimes statute may consider bias motivation when that motivation is directly connected to a defendant's criminal conduct. By requiring this connection to criminal activity, this legislation does not chill protected speech and does not violate the first amendment.”); Lawrence, *supra* note 3, at 266.

116. *E.g.*, H.R. REP. NO. 110-113, at 17 (2007).

117. Gey, *supra* note 71, at 1014–15; *see infra* Part IV.

118. *See generally* Gey, *supra* note 71; *see infra* Part IV.C.

119. *Virginia v. Black*, 538 U.S. 343, 347 (2003).

120. *Id.* at 348 (citing VA. CODE ANN. § 18.2-423 (1996)).

121. *Id.* at 347 (citing VA. CODE ANN. § 18.2-423 (1996)).

Second, the plurality opinion applied the overbreadth doctrine in a more stringent manner than previously known.¹²²

Because of the nature of the underlying offense, the facts are less relevant to consideration of House Bill 1592. In separate trials, juries convicted respondents Black, Elliot, and O'Mara of violating a Virginia statute banning cross-burning with the intent to intimidate any person or group.¹²³ Black had burned a cross at a Ku Klux Klan rally held near a public highway, and the Commonwealth charged Black under the statute.¹²⁴ At trial, the court instructed the jury that "intent to intimidate means the motivation to intentionally put a person or group of persons in fear of bodily harm."¹²⁵ The trial court also instructed the jury that it could infer intent to intimidate from the act of cross-burning by itself.¹²⁶ Black objected to this instruction on First Amendment grounds.¹²⁷ Elliot and O'Mara had burned a cross in the yard of Elliot's African-American next-door neighbor.¹²⁸ The trial court similarly instructed the jury that it had to find intent to intimidate through the act of cross-burning; however, it did not instruct the jury that they could infer that intent from the act itself.¹²⁹

The Supreme Court of Virginia consolidated the cases and reversed, finding the statute facially unconstitutional.¹³⁰ The court found the statute indistinguishable from that invalidated by the Supreme Court of the United States in *R. A. V.*¹³¹ Additionally, the Supreme Court of Virginia found the provision within the statute allowing the cross-burning itself to constitute *prima facie* evidence of intent to intimidate

122. *Id.* at 365–67 (plurality opinion).

123. *Id.* at 348–51.

124. *Id.* at 348–49.

125. *Id.* at 349.

126. *Id.*

127. *Id.*

128. *Id.* at 350.

129. *Id.* at 351.

130. *Black v. Commonwealth*, 262 Va. 764, 768, 553 S.E.2d 738, 740 (2001), *aff'd in part, rev'd in part sub nom. Virginia v. Black*, 538 U.S. 343 (2003).

131. *Id.* at 772, 553 S.E.2d at 742; *see supra* Part III.B.1. The Virginia Supreme Court reasoned, "The Virginia cross burning statute is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.* While a statute of neutral application proscribing intimidation or threats may be permissible, a statute punishing intimidation or threats based only upon racial, religious, or some other selective content-focused category of otherwise protected speech violates the First Amendment In this case, the Commonwealth seeks to proscribe expressive conduct that is intimidating in nature, but selectively chooses only cross burning because of its distinctive message. As the Court in *R.A.V.* succinctly stated: 'the government may not regulate use based upon hostility—or favoritism—towards the underlying message expressed.'" *Black*, 262 Va. at 772–74, 553 S.E.2d at 742–44 (quoting *R. A. V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)).

unconstitutionally overbroad due to its chilling effect.¹³² The Supreme Court of the United States undertook review of the Supreme Court of Virginia's decision.¹³³

Justice O'Connor delivered the opinion of the Court; however, a portion of Justice O'Connor's opinion in *Black* garnered only a plurality.¹³⁴ The Court prefaced that the First Amendment generally prohibits governments from imposing content regulations on speech—even distasteful speech.¹³⁵ The Court, thus, echoed the underlying principle stated in *R. A. V.*¹³⁶ However, the Court recognized limited categories of speech that governments may lawfully restrict because they are “‘of such slight social value... that any benefit... is clearly outweighed by the social interest in order and morality.’”¹³⁷ The Court identified “true threats” as one of these limited categories of unprotected speech.¹³⁸ True threats constitute communications in which the speaker threatens violence to someone so as to put him in fear.¹³⁹ On this basis, the Court upheld the constitutionality of banning cross-burning with the intent to intimidate.¹⁴⁰ In so doing, the Court effectively converted the Virginia statute from a content restriction on a specific message to a statute criminalizing conduct based on a particular motivation.¹⁴¹ Thus, the Court silently reaffirmed the principle articulated in *Mitchell* that state action could reach certain motivations.¹⁴² The restriction in the Virginia statute encompassed not a particular expressive view, but a content neutral motivation.¹⁴³

The plurality also considered the Supreme Court of Virginia's finding

132. *Id.* at 777, 553 S.E.2d at 746.

133. *Black v. Commonwealth*, 262 Va. 764, 553 S.E.2d 738 (2001), *cert. granted*, 535 U.S. 1094 (2002).

134. *Virginia v. Black*, 538 U.S. 343, 346–47 (2003) (showing that Justice O'Connor “delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V” which was joined by Chief Justice Roberts, Justice Stevens, and Justice Breyer).

135. *Id.* at 358.

136. *Id.*

137. *Id.* at 358–59 (quoting *R. A. V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)). The Court has long recognized these lesser protected categories of speech. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

138. *Black*, 538 U.S. at 359.

139. *Id.* at 359–60.

140. *Id.* at 362–63.

141. *Id.* at 361–63. In this way, the Court distinguished its holding from that in *R. A. V.* *Id.* at 362; *see supra* Part III.B.1. Unlike the statute in *R. A. V.*, which banned certain speech based on offensive racial content, the Virginia statute criminalized speech impelled by a particular motivation—intimidation. *Black*, 538 U.S. at 361–62; *see supra* Part III.B.1.

142. *Black*, 538 U.S. at 361; *see supra* Part III.B.2.

143. *Black*, 538 U.S. at 362.

that the Virginia statute was unconstitutionally overbroad due to its provision that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate....”¹⁴⁴ This provision essentially relieved the prosecution of the burden to produce evidence of motivation.¹⁴⁵ The plurality reasoned that this provision essentially dispensed with the motive element, converting the statute into a naked content restriction and rendering the statute unconstitutional.¹⁴⁶ Moreover, this provision raised the danger of the chilling effect.¹⁴⁷ While individuals may burn crosses to intimidate, they may also do so to convey ideological or political messages.¹⁴⁸ The prima facie evidence provision created the “possibility” that the government would “prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.”¹⁴⁹ The statute, thus, dispensed with circumstantial evidence necessary to prove that the motivation underlying the act of cross-burning was intimidation.¹⁵⁰

In holding the statute overbroad, the plurality perceptibly expanded the overbreadth doctrine as applied in *Mitchell*.¹⁵¹ The conjectural possibility that individuals would self-censor protected speech for fear of prosecution was enough for the plurality to find overbreadth.¹⁵² This enhancement of the overbreadth doctrine did not escape Justice Scalia who, in his dissent, chastised the plurality for justifying the application of the overbreadth doctrine on mere possibilities.¹⁵³ Ultimately, the Court in *Black* reaffirmed that governments may punish bias-motivated crimes consistent with the First Amendment.¹⁵⁴ Moreover, the plurality signaled an increasing sensitivity to the potential chilling effect of such statutes and a greater willingness to expand the application of the

144. *Id.* at 363 (plurality opinion) (quoting VA. CODE ANN. § 18.2-423 (1996)).

145. *Id.* at 364 (quoting *Black v. Commonwealth*, 262 Va. 764, 778, 553 S.E.2d 738, 746 (2001), *aff'd in part, rev'd in part sub nom. Virginia v. Black*, 538 U.S. 343 (2003)).

146. *See id.* at 365.

147. *Id.*

148. *Id.*

149. *Id.* (emphasis added).

150. *Id.* at 367.

151. *See id.* at 365; *supra* notes 107–14 and accompanying text.

152. *Black*, 538 U.S. at 365.

153. *Id.* at 373 (Scalia, J., dissenting). Scalia also objected, “We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether the *prohibitory terms* of a particular statute extend to protected conduct” *Id.* at 371 (emphasis in original).

154. *Id.* at 361 (majority opinion).

overbreadth doctrine.¹⁵⁵

Testifying before the House Subcommittee on Crime, Terrorism, and Homeland Security, Dean Lawrence cited *Black*, as well as *Mitchell*, for the proposition that punishing crimes motivated by bigotry is consonant with the First Amendment.¹⁵⁶ However, *Black* presented a distinctive situation because it concerned a restriction on a narrow category of expressive conduct motivated by the intent to intimidate rather than a penalty enhancement for non-expressive criminal conduct motivated by bias.¹⁵⁷ In addition, House Bill 1592's supporters who share Lawrence's view may discount the new rigor that the *Black* plurality introduces into the overbreadth doctrine.¹⁵⁸ Nevertheless, regardless of the Court's hate crime precedent, penalty enhancements like those found in the Hate Crimes Prevention Act of 2007 pose First Amendment dangers which the Court has not yet squarely addressed.

IV. THE FIRST AMENDMENT DANGERS OF PENALTY ENHANCEMENT STATUTES

A. The Inconsistent Theory that Hate Crimes Are Not Direct Regulations on Speech

Penalty enhancement statutes remain problematic even after *Mitchell* because the Court failed to resolve crucial First Amendment problems with such legislation.¹⁵⁹ The Court's holding that the Wisconsin statute did not directly regulate speech poses problems.¹⁶⁰ In reaching this holding, the *Mitchell* Court conflated two mutually exclusive—and equally problematic—legal conceptions of the hate crimes statute at issue.¹⁶¹ One conception views the substantive criminal offense and the

155. *See id.* at 365 (plurality opinion).

156. *Hearing on H.R. 1592, supra* note 8, at 39–40 (statement of Frederick M. Lawrence, Dean, George Washington Univ. Law Sch.) (“[I]n Wisconsin against Mitchell, a unanimous Supreme Court upheld the constitutionality of a bias crime law. And why? Because, as Chief Justice Rehnquist said, we are not punishing thoughts. We are punishing action. We are not punishing expression. We are punishing the acting on those expressions in a violent way. Similarly, when the Supreme Court upheld the cross burning statute in Virginia, in Virginia against Black, the court said that one may focus on act, not on expression of ideas.”); *see also* Lawrence, *supra* note 3, at 268–70.

157. *Compare Black*, 538 U.S. at 347–48, with Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (as passed by House, May 3, 2007).

158. *See supra* notes 151–55 and accompanying text.

159. *See Gey, supra* note 71, at 1014–15; *supra* Part.III.B.2.

160. *See supra* notes 103–04 and accompanying text.

161. *See Gey, supra* note 71, at 1025.

defendant's bias-motivation as a single act of conduct unprotected by the First Amendment.¹⁶² The other views the substantive criminal conduct and the motivation as two distinct acts.¹⁶³ The *Mitchell* Court inconsistently embraced both views, and with that conflation, the Court struggled to distinguish expression of motivation from fully protected expression of thought and find that the state could punish motivation because it was not speech at all.¹⁶⁴ This same theoretical inconsistency is present in *Black*.¹⁶⁵

The *Mitchell* Court initially denied the First Amendment challenge by arguing that the Wisconsin statute punished not expression but violent conduct that received no First Amendment protection.¹⁶⁶ Under this "one act" conception of the hate crime, the motivation for the criminal act essentially becomes subsumed within the act itself.¹⁶⁷ In a sense, Mitchell's racist motivation, as signified by his speech, became so intertwined with the assault that it became part of that same crime.¹⁶⁸ Thus, the speech becomes punishable because the theory transforms it into unprotected conduct.¹⁶⁹ The Court justifies this conception by arguing that the penalty enhancement statute merely allows sentencing judges to account for motive and is, therefore, no different than other substantive crimes.¹⁷⁰ The flaw in this "one act" conception is that a penalty enhancement statute in reality treats the defendant's speech as a separate punishable act.¹⁷¹ To prove bias-motive, prosecutors must introduce evidence that is entirely distinct from the evidence of the substantive crime.¹⁷² This is the very origin of the potential chilling effect.¹⁷³ While evidence of the substantive crime focuses solely on physical acts, evidence of motive focuses entirely on the defendant's

162. *See id.* at 1025–34.

163. *See id.* at 1034–36.

164. *Id.* at 1015, 1020; *see infra* notes 166–198 and accompanying text.

165. *See supra* notes 134–50 and accompanying text.

166. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (“[O]ur cases reject the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.” (internal citations and quotations omitted)); *see also id.* at 487 (“But whereas the ordinance struck down in *R. A. V.* was explicitly directed as expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment.”).

167. Gey, *supra* note 71, at 1024–26.

168. *See id.* at 1025.

169. *Id.* at 1024.

170. *Id.* at 1026; *see Mitchell*, 508 U.S. at 485 (drawing an analogy between enhancing penalties for assault based on racist motive and enhancing the penalty for murder committed for pecuniary gain).

171. Gey, *supra* note 71, at 1025–26.

172. *Id.*

173. *See supra* Part.III.A.

speech and associations.¹⁷⁴ These two qualitatively different kinds of proof militate against the “one act” concept.¹⁷⁵

Supporters of penalty enhancement statutes might respond that evidence of a murder and evidence of pecuniary motive are also qualitatively different in that evidence of such motive will focus on speech and financial history as opposed to acts.¹⁷⁶ However, evidence of pecuniary motive or the brutal nature of a particular crime pertains to ideologically neutral social interests—detering those similarly situated and assessing the future danger posed by the defendant.¹⁷⁷ Conversely, enhancing the penalty based on evidence of prior bigoted speech is not ideologically neutral; rather, it reflects society’s general disapprobation of such views.¹⁷⁸ Yet, the *R. A. V.* Court made clear, shortly before *Mitchell*, that “[t]he First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed.”¹⁷⁹ Indeed, the *Mitchell* Court stated that a statute may not enhance penalty merely because of the defendant’s abstract beliefs.¹⁸⁰ The Court has generally only allowed the criminalization of conduct linked to speech when the action results in distinct nonideological criminal consequences.¹⁸¹ The *Mitchell* Court paid some homage to this notion by arguing that bias-motivation produced distinct social harms such as retaliatory crimes, community unrest, and emotional trauma.¹⁸² However, these nonideological justifications for enhanced penalty presume that the perpetrator’s motives will be immediately apparent to both the victim and the wider community.¹⁸³ While that may be the case in many bias crimes, the penalty enhancement statutes certainly encompass more subtle bias-motivated crimes as well.¹⁸⁴ Thus, penalty enhancement punishes bigoted expression.¹⁸⁵ This conclusion leads to an equally problematic “two act” conception of such statutes.

The *Mitchell* Court also recognized the alternative “two act”

174. Gey, *supra* note 71, at 1025–26.

175. *Id.*

176. *See Wisconsin v. Mitchell*, 508 U.S. 476, 485, 489 (1993).

177. Gey, *supra* note 71, at 1029–30.

178. *See id.* at 1030.

179. *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

180. *See Mitchell*, 508 U.S. at 485.

181. Gey, *supra* note 71, at 1030 & n.109 (citing *R. A. V.*, 505 U.S. at 385).

182. *See Mitchell*, 508 U.S. at 487–88.

183. Gey, *supra* note 71, at 1044.

184. *Id.*

185. *Id.* at 1034.

conception that the statute prohibited two independent acts of unprotected conduct—the underlying violent crime and the actual selection of the victim based on bias.¹⁸⁶ To support this conception, the Court drew an analogy between the Wisconsin statute and Title VII of the Civil Rights Act of 1964.¹⁸⁷ The Court posited that, like the Wisconsin penalty enhancement, Title VII punishes the defendant's discriminatory motive by making it unlawful for employers to treat employees unequally “‘*because of* such individual's race, color, religion, sex, or national origin.’”¹⁸⁸ The Court's clear implication was that the two provisions' parallel use of the language “because of” essentially rendered them legally indistinguishable in operation.¹⁸⁹ Indeed, the Hate Crimes Prevention Act of 2007 also uses the language “*because of* the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person....”¹⁹⁰ While superficially similar, the practical operation of the two statutes proves different.¹⁹¹ In Title VII, the language “because of” refers to the ultimate illegal act—discriminatory employment practices.¹⁹² Absent the discriminatory motive, standard employment practices such as hiring and firing are not unlawful.¹⁹³ The language, thus, does not single out additional unlawful conduct; rather, it defines the single act that the statute prohibits.¹⁹⁴ In contrast, in penalty enhancement statutes, the motivation does not define the ultimate criminal act—bodily violence; rather, that act is criminal in itself without more.¹⁹⁵ The phrase “because of” refers to the subjective reasons for which the defendant committed an acknowledged crime.¹⁹⁶ Thus, the hate crime comes unhinged from the substantive offense and becomes, in practice, a prohibition on bigoted expression.¹⁹⁷ *R.A.V.* expressly rejected

186. *Id.* at 1035, 1037; *see Mitchell*, 508 U.S. at 487.

187. Gey, *supra* note 71, at 1036; *see Mitchell*, 508 U.S. at 487.

188. *Mitchell*, 508 U.S. at 487 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)) (emphasis original). The Court pointed out that its precedent expressly held that Title VII did not violate the First Amendment rights of defendant employers. *Id.* (citing *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)).

189. *See id.* at 480, 487 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006); WIS. STAT. § 939.645(1)(b) (1989–90)).

190. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6(a) (as passed by House, May 3, 2007) (emphasis added).

191. *Cf. Grey*, *supra* note 71, at 1039.

192. *Id.*

193. *See id.*

194. *Id.*

195. *Id.* at 1039–40.

196. *Id.* at 1040.

197. *Id.*

punishment of speech merely on the basis of discriminatory content.¹⁹⁸

Both the “one act” and the “two act” explanation as to why penalty enhancement statutes do not constitute direct regulation on speech are subject to doubt.¹⁹⁹ Recognizing these weaknesses, both the *Mitchell* Court and proponents of the Hate Crimes Prevention Act of 2007 compensate by combining the two separate theories.²⁰⁰ Thus, the *Mitchell* Court implicitly recognized the requirement of a close nexus between the bigoted expression and the substantive crime.²⁰¹ The close linkage of the two incorporates elements of the “one act” and “two act” conception; while the bias motivation is a separate crime, it is close enough to the prohibited conduct to justify regulation.²⁰²

Recognition of this theoretical problem may have prompted the *Black* Court to reject the concept of cross-burning as unprotected conduct and, instead, classify the conduct as a category of unprotected speech.²⁰³ Yet, *Black* presents a similar problem. Because the Court recognized that cross-burning as a statement of ideology would receive First Amendment protection, the Court essentially allows the state to punish motivation—the intent to intimidate.²⁰⁴ Supporters of House Bill 1592 also point to *Mitchell*’s close nexus theory, incorporated into House Bill 1592’s Rule of Evidence provision, as a mechanism for mitigating the chilling effect.²⁰⁵ This argument poses additional problems because the close nexus theory still fails to adequately insulate protected expression.

B. The Minimal Danger Posed by Conspiracy and Accomplice Liability

While the proposed legislation poses a real danger of chilling protected speech, it does not do so in the manner many legislators fear. During the debate over House Bill 1592’s passage, legislators argued that the provisions threatened the freedom of religious leaders to preach the immorality of homosexual behavior.²⁰⁶ They posited that the Hate

198. *R. A. V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

199. See *supra* notes 166–198 and accompanying text.

200. Gey, *supra* note 71, at 1042.

201. *Id.*; *supra* note 106 and accompanying text.

202. See Gey, *supra* note 71, at 1042.

203. See *Virginia v. Black*, 538 U.S. 343, 360 n.2 (2003).

204. See *id.* at 363.

205. See, e.g., *Hearing on H.R. 1592*, *supra* note 8, at 114 (statement of Mark L. Shurtleff, Att’y Gen., Utah); H.R. REP. NO. 110-113, at 15–16 (2007); cf. Lawrence, *supra* note 3, at 267.

206. E.g., *Hearing on H.R. 1592*, *supra* note 8, at 3–4 (statement of Rep. Louie Gohmert, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.); H.R. REP. NO. 110-113, at 41

Crimes Prevention Act of 2007, operating in conjunction with other federal statutes providing for general conspiracy and accomplice liability, would criminalize such protected expression.²⁰⁷ In particular, Representative Louie Gohmert voiced concern that clergy who vocally opposed homosexuality could be convicted of aiding and abetting violent crimes committed by members of their congregation against homosexuals.²⁰⁸ Brad W. Dacus, President of the Pacific Justice Institute, raised similar concerns.²⁰⁹ Federal conspiracy and accomplice liability statutes could implicate religious leaders in the substantive offense of the Hate Crimes Prevention Act.²¹⁰ However, because the federal judiciary has narrowly limited the operation of such statutes, these fears are largely misplaced. Federal courts have held that conspirators must coordinate the object and essential plan of the conspiracy.²¹¹ Moreover, an individual must share the criminal intent of the substantive offender to be a co-conspirator.²¹² Similarly, to be liable as an accomplice, an individual must participate in a crime and intend to achieve its object.²¹³ In addition, the Supreme Court's decision in *Brandenburg v. Ohio* accords significant First Amendment protection of speech, even to advocacy of violent force.²¹⁴ These safeguards dispose of one potential chilling effect on free expression.

1. Potential Liability Under Conspiracy Law

Although few legislators specifically referenced it in debate, the general federal statute criminalizing conspiracy to violate laws of the

(2007) ("Ultimately, a pastor's sermon concerning religious beliefs and teachings could be considered to cause violence and will be punished or at least investigated. Once the legal framework is in place, political pressure will be placed on prosecutors to investigate pastors or other religious leaders who quote the Bible or express their long-held beliefs on the morality and appropriateness of certain behaviors. Religious teachings and common beliefs will fall under government scrutiny, chilling every American's right to worship in the manner they choose and to express their religious beliefs.").

207. *E.g.*, H.R. REP. NO. 110-113, at 39, 41 (2007).

208. *Hearing on H.R. 1592, supra* note 8, at 3–4 (statement of Rep. Louie Gohmert, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.) ("One other aspect that is not usually discussed will come in the new law would be applied along with Article 18 U.S. Code Section 2(a) of the Federal criminal code that says, 'Whoever aids, abets, counsels, commands, induces or procures a crime commission is punishable just as if he is the principal.'"); *see also* H.R. REP. NO. 110-113, at 39 (2007).

209. *See Hearing on H.R. 1592, supra* note 8, at 124 (statement of Brad W. Dacus, President, Pac. Justice Inst.).

210. *See, e.g.*, 18 U.S.C. §§ 2, 371 (2006).

211. *See, e.g.*, *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977).

212. *See, e.g.*, *United States v. Feola*, 420 U.S. 671, 692 (1975).

213. *See, e.g.*, *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

214. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (*per curiam*).

United States presents one possible threat to religious leaders' expression.²¹⁵ Federal criminal conspiracy law provides, "If two or more persons conspire... to commit any offense against the United States... and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined... or imprisoned not more than five years, or both."²¹⁶ Under this language, the issue becomes whether a religious leader's vigorous preaching against the evils of homosexuality to a member of his congregation can unwittingly result in a conspiracy to violate the Hate Crimes Prevention Act. If so, and a congregation member did commit an overt act of violence against a homosexual, then the religious leader would be liable as a co-conspirator. However, this outcome is highly improbable because merely preaching the evils of homosexual behavior does not satisfy the necessary elements of conspiracy as set forth by federal courts.²¹⁷

In applying federal conspiracy law, the Supreme Court of the United States and lower federal courts have repeatedly reaffirmed that "the essence of a conspiracy is 'an *agreement* to commit an unlawful act.'"²¹⁸ Indeed, the Supreme Court has emphasized that the policy justification underlying the crime of conspiracy is the unique danger to society arising from the agreement to commit unlawful acts.²¹⁹ Agreement constitutes the very danger against which the crime of conspiracy seeks to protect.²²⁰ Therefore, to be a co-conspirator, a religious leader's preaching would have to constitute at least a tacit agreement with their congregation members to do violence to homosexuals. However, courts have also strictly defined agreement in the conspiracy context. Agreement requires a "meeting of minds" between two or more individuals.²²¹ Co-conspirators must reach some common ground as to

215. Opponents of House Bill 1592 referred to conspiracy liability in their dissenting views included in the House Judiciary Committee report on that bill. H.R. REP. NO. 110-113, at 38 (2007).

216. 18 U.S.C. § 371 (2006).

217. See *supra* notes 215–34 and accompanying text.

218. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)) (emphasis added); e.g., *Ingram v. United States*, 360 U.S. 672, 677–78 (1959); *Pereira v. United States*, 347 U.S. 1, 11–12 (1954); *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977); *United States v. Mendez*, 496 F.2d 128, 129 (5th Cir. 1974); *Marino v. United States*, 91 F.2d 691, 694 (9th Cir. 1937).

219. *Iannelli*, 420 U.S. at 778 (quoting *Callanan v. United States*, 364 U.S. 587, 593 (1961)) ("[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality.").

220. See *Callanan*, 364 U.S. at 593.

221. *Rosenblatt*, 554 F.2d at 38 (quoting *Krulewitch v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring)).

the object of the conspiracy and the essential nature of the plan to achieve that object.²²² A general understanding that the parties will engage in unspecified illegal conduct in the future is not sufficient for an agreement.²²³ Thus, in *United States v. Rosenblatt*, the Second Circuit held that the defendant could not be liable for conspiracy to defraud the federal government for allegedly engaging in money laundering.²²⁴ While the defendant and the substantive offender had in fact agreed to defraud the government, the defendant believed the checks were valid.²²⁵ Therefore, the defendant and the substantive offender had reached merely a general understanding that they would violate the law and had not contrived the essentials of a plan.²²⁶ By contrast, in *United States v. Grassi*, the Fifth Circuit held the defendant liable for conspiracy because he not only agreed to commit the offense in principle, but also negotiated the actual details for the purchase of a controlled substance with undercover agents.²²⁷ Thus, while a formal oral contract is not necessary, some active coordination and participation as to the actual details of the criminal undertaking is required for an agreement.²²⁸ Mere knowledge, acquiescence, or approval of another's criminal act does not render one a co-conspirator.²²⁹

The requirement that the parties actively coordinate the criminal object of the conspiracy and the plan for reaching that objective insulates religious leaders who merely preach the immorality of homosexual behavior and coordinate no specific plan with their congregation members to inflict bodily harm. A congregation member who translates abstract beliefs about the evil of homosexuality into a motive to commit violent acts against homosexuals reaches no agreement with his minister as to criminal object. Even if the religious

222. *Id.* at 38–39 (citing *Blumenthal v. United States*, 332 U.S. 539, 557 (1947)).

223. *Id.* at 39; *see also* *United States v. Grassi*, 616 F.2d 1295, 1301 (5th Cir. 1980).

224. *Rosenblatt*, 554 F.2d at 37–39.

225. *Id.* at 37–38 (“Our difficulty with [the defendant’s] conviction arises from the lack of any agreement between him and [the substantive offender] concerning the type of fraud in which they were engaged. It is clear that [the substantive offender] was defrauding the United States by obtaining payment for government checks which he had caused to be printed without authorization. The government stipulated, however, that [the defendant] did not know the truth about [the substantive offender’s] activities In other words, both men agreed to defraud the United States, but neither agreed on the type of fraud.”).

226. *Id.* at 38.

227. *Grassi*, 616 F.2d at 1302.

228. *United States v. Mendez*, 496 F.2d 128, 130 (5th Cir. 1974); *see also* *United States v. Bavers*, 787 F.2d 1022, 1027 (6th Cir. 1985).

229. *Mendez*, 496 F.2d at 130.

leader expressly advocates violence against homosexuals, no coordination or plan for achieving the shared object would exist.

The requirement of agreement between the parties closely relates to another crucial limitation on conspiracy liability—intent. A person cannot conspire to commit a particular substantive crime without exhibiting the requisite level of criminal intent for that underlying offense.²³⁰ Therefore, a person cannot be liable as a conspirator unless the prosecution proves that his intent was coextensive with that of the substantive criminal actor.²³¹ To convict a religious leader of conspiracy to violate the Hate Crimes Prevention Act, a prosecutor would have to demonstrate that he had specific intent to inflict bodily injury on a particular victim. Moral disapprobation of homosexuality hardly signifies intent to inflict bodily harm. In addition, the Supreme Court of the United States emphasized that a person cannot demonstrate intent if he had no knowledge of the criminal design of the substantive criminal actor.²³² Therefore, a religious leader who had no knowledge that a congregation member acted on his preaching by attacking a homosexual cannot share the member's criminal intent. Supporters of the Hate Crimes Prevention Act have argued that this intent requirement provides ample safeguard for religious leaders' protected expression condemning homosexuality.²³³ In sum, the agreement and intent elements that courts have recognized in applying federal conspiracy law substantially reduce the potential that the Hate Crimes Prevention Act will expose

religious leaders to conspiracy liability merely for condemning homosexual behavior.²³⁴

230. *Ingram v. United States*, 360 U.S. 672, 678 (1959); *see United States v. Feola*, 420 U.S. 671, 692 (1975).

231. *Ingram*, 360 U.S. at 678.

232. *Id.* (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)) (“Without the knowledge, the intent cannot exist.”).

233. *See, e.g., Hearing on H.R. 1592, supra* note 8, at 40 (statement of Frederick M. Lawrence, Dean, George Washington Univ. Law Sch.) (“Complicity is a well-known doctrine in the criminal law that requires an intent to see the crime happen. There will be no punishment under this statute or any statute for someone expressing views. There will certainly be the potential for punishment for someone who acts with the intent to see a bias crime happen, and there should be.”).

234. *See id.*

2. Potential Liability Under Accomplice Law

Opponents of House Bill 1592 also repeatedly voiced concerns that the proposed legislation exposed religious leaders to federal accomplice liability.²³⁵ The general accomplice liability statute provides, “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”²³⁶ Unlike in a conspiracy, aiding and abetting does not require proof of agreement between the parties.²³⁷ However, as with conspiracy law, in applying accomplice liability the federal judiciary has incorporated limitations that serve to insulate protected expression. To be liable as an accomplice under the statute, an individual must associate himself in some way with the criminal undertaking, participate in it, and intend that it succeed.²³⁸

In *United States v. Tarr*, the First Circuit held that the defendant’s delivery of a single illegal firearm did not result in liability because there was no evidence he participated in the principals’ undertaking to engage in the selling of firearms for profit.²³⁹ In *United States v. Martinez*, the Fifth Circuit found that the defendant had sufficiently associated himself with the sale of narcotics by following the principal to the exchange point and keeping a lookout a short distance away in his car.²⁴⁰ Therefore, knowledge of the criminal undertaking and some active participation are necessary.²⁴¹ Moreover, to participate in the crime, the individual must perform some affirmative act designed to facilitate its commission.²⁴² To satisfy the definition of accomplice liability, the individual must consciously assist the principal in committing the crime in some active way.²⁴³ Mere association with the substantive criminal actor is an insufficient basis for accomplice liability.²⁴⁴ Therefore, in

235. See, e.g., *Hearing on H.R. 1592, supra* note 8, at 3–4 (statement of Rep. Louie Gohmert, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.).

236. 18 U.S.C. § 2(a) (2006).

237. *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975); *Pereira v. United States*, 347 U.S. 1, 11 (1954).

238. *United States v. Garcia-Geronimo*, 663 F.2d 738, 743 (7th Cir. 1981) (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)); *United States v. Tarr*, 589 F.2d 55, 59 (1st Cir. 1978) (citing *Nye & Nissen*, 336 U.S. at 619); *United States v. Martinez*, 555 F.2d 1269, 1272 (5th Cir. 1977).

239. *Tarr*, 589 F.2d at 59.

240. *Martinez*, 555 F.2d at 1272.

241. See *supra* notes 238–40 and accompanying text.

242. See *id.*

243. *United States v. Dickerson*, 508 F.2d 1216, 1217–18 (2d Cir. 1975) (citing *Nye & Nissen*, 336 U.S. at 619).

244. *Martinez*, 555 F.2d at 1271.

Tarr, the mere fact that the defendant knew the principals did not prove that he was privy to their plan.²⁴⁵ Similarly, in *United States v. Dickerson*, the Second Circuit found that the defendant's mere presence during his criminal associates' assault on a federal agent did not warrant accomplice liability because the defendant had not intended, by his mere presence, to participate in the crime.²⁴⁶ By contrast, in *Martinez*, the defendant clearly intended his presence to assist in the crime because he served as a lookout.²⁴⁷

Moreover, the substantive crime must be a natural and foreseeable result of the individuals' actions for accomplice liability to attach.²⁴⁸ As with conspiracy, the accomplice must also share the criminal intent of the principal as to the substantive crime.²⁴⁹ The requirements of foreseeability and intent to commit the substantive offense serve as important safeguards for the protected expression of clergy.²⁵⁰ An unknowing priest cannot be an accomplice if a congregation member transforms vocal opposition to homosexuality into a motive to commit violence against homosexuals. In such a situation, intent and foreseeability are absent as to the priest.

Moreover, courts have incorporated certain First Amendment safeguards into accomplice and conspiracy law to provide further safeguards against liability for speech. Courts have held that an individual's speech can constitute participation in a criminal venture through counseling, advising, or encouraging the criminal act.²⁵¹ The First Amendment does not immunize an individual from accomplice liability simply because he used words to further the principal's commission of a crime.²⁵² However, the courts have carefully delineated between protected advocacy and speech that essentially forms part of unprotected criminal conduct; unlike the abstract advocacy of crime, specific advice and detailed instructions as to how to commit a particular

245. *United States v. Tarr*, 589 F.2d 55, 60 (1st Cir. 1978).

246. *Dickerson*, 508 F.2d at 1218–19. The defendant had engaged in a conspiracy to sell an illegal firearm to an undercover agent and was present when his confederates assaulted the agent. *Id.* at 1217.

247. *Martinez*, 555 F.2d at 1272.

248. *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982); *Dickerson*, 508 F.2d at 1218 (citing *Pinkerton v. United States*, 328 U.S. 640, 648 (1946)).

249. *Tarr*, 589 F.2d at 59; *United States v. Barclay*, 560 F.2d 812, 816 (7th Cir. 1977).

250. See *supra* note 233 and accompanying text.

251. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)); *Barnett*, 667 F.2d at 841–42.

252. *Rice*, 128 F.3d at 243–44; *Barnett*, 667 F.2d at 842–43.

offense result in accomplice liability.²⁵³ In other words, generally encouraging others to commit a crime does not constitute participation in the criminal venture, but providing individuals with specific details as to how to achieve the criminal object in a particular set of circumstances does satisfy accomplice liability.²⁵⁴ Therefore, a religious leader cannot participate in a violent crime against a homosexual merely by expressing the abstract belief that homosexuality is wrong or—in the more extreme case—by advocating bodily violence to homosexuals. Unless a religious leader provides specific instructions as to how to inflict bodily injury in a particular case, he has not counseled or advised the substantive criminal actor as required under accomplice liability.²⁵⁵

In the context of accomplice liability for violent crimes, the Fourth Circuit has incorporated the Supreme Court of the United States' analysis in *Brandenburg v. Ohio* to make this subtle distinction between protected speech and speech that satisfies accomplice liability.²⁵⁶ In *Brandenburg*, the Court considered whether the Ohio Criminal Syndicalism statute violated the First Amendment.²⁵⁷ That statute made it unlawful to “‘advocat[e]... the duty, necessity, and propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial and political reform’” or to “‘voluntarily assembl[e] with any society... formed to teach or advocate the doctrines of criminal syndicalism.’”²⁵⁸ The defendant, a leader in the Ku Klux Klan, was convicted under the statute for appearing at a rally at which he advocated various acts of violence towards blacks and Jews.²⁵⁹ The Court found that the Ohio statute's blanket prohibition on advocating criminal violence violated the First Amendment.²⁶⁰ States cannot constitutionally criminalize the abstract advocacy or encouragement of the use of force or violating the law unless the speaker intends such advocacy to incite immediate, imminent violation of the law.²⁶¹ Therefore, the mere abstract advocacy of resorting to violence

253. *Rice*, 128 F.3d at 246; *Barnett*, 667 F.2d at 842–43 (citing *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978)); *Robinson v. United States*, 262 F.2d 645, 650–51 (9th Cir. 1959). For example, in *Buttorff*, the Eighth Circuit held the defendants liable for aiding and abetting tax evasion by holding a meeting at which they instructed others on specific ways to avoid paying their taxes as opposed to simply advocating that others not pay their taxes. *Buttorff*, 572 F.2d at 624.

254. See *supra* note 253 and accompanying text.

255. See *id.*

256. *Rice*, 128 F.3d at 243–44.

257. 395 U.S. 444, 444–45 (1969).

258. *Id.* (quoting OHIO REV. CODE ANN. § 2923.13 (West 1969) (repealed 1971)).

259. *Id.* at 444–47.

260. *Id.* at 448.

261. *Id.* at 447.

constituted protected expression under the First Amendment.²⁶² By incorporating the *Brandenburg* rule into accomplice liability jurisprudence, lower courts have espoused the principle that while mere abstract teaching or advocacy to violate the law does not result in accomplice liability, “‘speech brigaded with action’” does.²⁶³

In *Rice v. Paladin Enterprises*, the Fourth Circuit considered whether imposing accomplice liability in a civil suit against a publisher for wrongful death violated the First Amendment.²⁶⁴ The defendant had published a book entitled *Hit Man: A Technical Manual for Independent Contractors*, which instructed readers in specific, intricate detail how to effectively commit the crime of murder for hire.²⁶⁵ Having read this manual, James Perry brutally murdered the plaintiffs’ decedents.²⁶⁶ Perry acted as a contract killer hired by a victim’s ex-husband.²⁶⁷ In committing the substantive crime, Perry followed the manual’s specific instructions to the letter.²⁶⁸ Significantly, the defendant publisher stipulated that it knew and intended that criminals seeking instruction on how to commit murder for hire would obtain and use the manual.²⁶⁹ The defendant even acknowledged that it had in fact assisted Perry in committing the murders by publishing the book.²⁷⁰ The defendant clearly shared the criminal intent of the principal.²⁷¹ However, the defendant argued that the First Amendment presented an absolute bar to accomplice liability based on expression.²⁷² The Fourth Circuit held that the First Amendment did not bar liability because it does not immunize speech constituting aiding and abetting.²⁷³ While the *Brandenburg* holding accords protection to abstract advocacy of violent action,

262. *Id.*

263. *E.g.*, *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 244 (4th Cir. 1997) (quoting *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring)); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970).

264. *Rice*, 128 F.3d at 241.

265. *Id.* at 235–41. The manual described in gruesome, graphic detail how to commit the crime of murder for hire including: how to effectively kill with knives, firearms, and explosives; how to remove the serial number on the weapon to avoid detection; how to alter the ballistic markings of a firearm to avoid detection; how to effectively torture a person in order to extract information; how to construct a bomb out of fertilizer; how to make arson appear accidental; how to dispose of a body; and how to cope with the psychological effects of killing. *Id.* at 235–39.

266. *Id.* at 239.

267. *Id.*

268. *Id.*

269. *Id.* at 241.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 242–43.

speech that essentially functions as “legitimately proscribable nonexpressive conduct” receives no such protection.²⁷⁴ Speech, in other words, receives no protection when it forms an integral part of a crime.²⁷⁵ The court proceeded to define this distinction between protected advocacy and speech that forms part of criminal conduct.²⁷⁶ Ultimately, the Fourth Circuit stated that general, abstract, or theoretical advocacy of violation of the law receives First Amendment protection and cannot result in accomplice liability.²⁷⁷ However, specific, concrete factual instructions designed to assist the principal to accomplish a particular crime receive no protection and can lead to accomplice liability.²⁷⁸ Subsequent federal court decisions have cited *Rice* approvingly.²⁷⁹

Under the uniformly accepted principles articulated in *Rice*,²⁸⁰ a religious leader would never be subject to accomplice liability for mere abstract, theoretical preaching about the reprehensibility of homosexual behavior. Indeed, a religious leader would never be subject to accomplice liability for expressly advocating violent acts against homosexuals. Rather, only specific, detailed instructions intended to assist congregation members in inflicting bodily injury against homosexuals in a particular set of circumstances would lead to such liability. A priest would have to advise parishioners in graphic, mechanical detail how exactly to violate the Hate Crimes Prevention Act to be liable as an accomplice. Preaching that homosexuality is immoral remains thoroughly insulated from prosecution. Ultimately, those who argue that the proposed legislation threatens to chill the protected speech of

274. *Id.* at 243.

275. *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

276. *Id.* at 243–45.

277. *Id.* at 246 (quoting *United States v. Kelley*, 769 F.2d 215, 217 (1985)).

278. *Id.* To support this distinction, the court cited numerous cases involving accomplice liability for tax fraud in which courts found liability because the defendants had provided specific instructions on how to prepare false tax reports. *Id.* at 244–46 (citing *United States v. Fleschner*, 98 F.3d 155, 158–59 (4th Cir. 1996); *Kelley*, 769 F.2d at 217; *United States v. Freeman*, 761 F.2d 549, 552–53 (9th Cir. 1985)).

279. *E.g.*, *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1019 n.14, 1025 (7th Cir. 2002) (holding the First Amendment did not prohibit attaching liability to an organization for funding terrorist activity as long as the organization knew about the terrorist activity, desired to help it, and engaged in some act to help it); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434, 447 n.19 (2nd. Cir. 2001) (holding that the First Amendment did not immunize the communication of instructions for hacking computers); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1280–81 (D. Colo. 2002) (dismissing a wrongful death suit against video game and movie entertainment companies for the deaths of students in a school shooting because plaintiffs did not allege that the companies shared the intent of the principals).

280. *Rice*, 128 F.3d at 245 (stating that the concept that specific instructions receive no First Amendment protection is uniformly accepted).

religious leaders fail to comprehend the carefully designed safeguards incorporated into the criminal law.²⁸¹ However, the chilling effect looms as another threat.

C. The Real Threat of the Chilling Effect

The Hate Crimes Prevention Act threatens to chill the protected expression of those who fear prosecution under the substantive offense. Congress incorporated the close nexus requirement of *Wisconsin v. Mitchell* into the Hate Crimes Prevention Act of 2007 by including a rule of evidence section providing: “In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense.”²⁸² Supporters of the bill argue that this provision in conjunction with *Mitchell* confines admissible evidence to speech that is temporally or causally related to the criminal offense.²⁸³ Under this construction, presumably epithets or bigoted language directed at the victim during or just prior to the violent act would be admissible; however, remote ideological statements in the past would not. This construction rests on the assumption that such proximate statements would be probative of motive, making it consistent with the *Mitchell* holding that penalty enhancement punishes motive, not conduct.²⁸⁴ Individuals, therefore, will not suppress protected ideological speech because they need not fear that it will be introduced as evidence in any future prosecution.²⁸⁵ However, this argument rests on a very narrow construction of the phrase “specifically relates to that offense.”²⁸⁶

One reading of this phrase suggests that the speech must be closely related in time and space to the criminal act to be admissible.²⁸⁷ It would, therefore, limit the introduction of expression to epithets or hateful speech used during the actual physical attack. However, another reading suggests that the speech merely must be causally related to the

281. See *supra* Part IV.B.

282. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6(a) (as referred to the Senate Committee on the Judiciary, May 7, 2007); see *supra* note 106 and accompanying text.

283. E.g., Lawrence, *supra* note 3, at 270; James Weinstein, *Hate Crime and Punishment: A Comment on Wisconsin v. Mitchell*, 73 OR. L. REV. 345, 378–79 (1994).

284. See *Wisconsin v. Mitchell*, 508 U.S. 476, 487–89 (1993).

285. See *id.* at 488–89.

286. H.R. 1592, § 6(a).

287. See *supra* note 283 and accompanying text.

selection of the specific victim.²⁸⁸ It could merely mean, for instance, that in a trial of a defendant for a hate crime committed against a homosexual, the prosecution cannot introduce evidence that the defendant is a white supremacist or an anti-Semite; however, the defendant's remote statements on the deplorability of homosexual behavior could still be admissible, because they are probative of the cause of the particular crime. The House Judiciary Committee Report on House Bill 1592 openly admits that the rule of evidence provision allows for the introduction of this sort of remote evidence:

This provision also recognizes, however, that evidence of an accused's speech, expression, or association may be properly relevant and not unfairly prejudicial if such evidence can be shown to be related to the crime at issue. An isolated racial slur remote in time to the charged offense, or merely incidental to the motive of the charged offense (for example, a racial slur uttered in the conduct of a robbery where robbery is manifestly the motive), or mere participation in an organization that holds and professes strong and negative views toward a given group, would presumably be excluded. In contrast, an accused's violence-themed set of statements displaying animus toward the victim's group, or statements evidencing hatred of a given group, persisting over a lengthy period, especially if close in time to the alleged offense, may indicate the motivation for the offense and properly be admissible as evidence—if there is other independent evidence of the accused's participation in the crime. This careful weighing of relevance against prejudice will help ensure an individual is not prosecuted simply for holding and expressing views, no matter how abhorrent.²⁸⁹

Therefore, supporters of House Bill 1592 certainly envision gathering evidence on defendants' past ideological statements and associations.²⁹⁰ “If hate crime prosecutions become common, and if prosecutors routinely introduce into evidence defendants' bigoted statements uttered long before the crime, as well as defendants' membership in bigoted organizations, it is far from speculative to posit a chilling effect on

288. H.R. REP. NO. 110-113, at 16 (2007).

289. *Id.*

290. *Id.*

protected speech.”²⁹¹ The House Judiciary Report cites the increasing incidence of hate crimes as the underlying justification for the legislation.²⁹² The Federal Bureau of Investigation (“FBI”) received reports of more than 113,000 hate crimes since 1991.²⁹³ The FBI, in fact, received reports of 7,163 bias-motivated crimes in 2005 alone.²⁹⁴ Moreover, such crimes have probably been underreported in the past.²⁹⁵ If hate crimes are so widespread, then presumably prosecutions under the Hate Crimes Prevention Act would be commonplace and well-known. Ordinary people, therefore, might have good reason to fear prosecution under the statute in the future—application of the state will be widespread. Additionally, the argument that future prosecution for a hate crime is too remote and conjectural is flawed because the statutory language proscribes not only the calculated, heinous attacks, but also the more spontaneous interracial brawls that may erupt at a bar or on the street.²⁹⁶ Some individuals may find themselves literally thrust into a hate crime situation. As the temporal connection between speech and the specific violent act becomes more attenuated, the chilling effect grows more threatening.²⁹⁷

The difficulty of proving subjective motivation to a jury further increases the grave danger that federal courts and prosecutors will resort to remote speech or associations as proof to enhance penalties.²⁹⁸ The problem that prosecutors will inevitably face is that epithets uttered during the actual commission of the alleged crime will frequently lack much probative value as to the defendant’s true motive; since most bias-motivated crimes are quickly escalating street encounters instead of calculated acts of brutality, proving that the defendant intentionally selected the victim based on race, sexual orientation, or sexual identity becomes difficult.²⁹⁹ In such a spontaneous context, a defendant may hurl an epithet at a homosexual during the criminal act, not because he has selected the victim based on his sexual orientation, but because he is overcome by anger and wishes to inflict additional emotional harm on

291. Weinstein, *supra* note 283, at 376.

292. H.R. REP. NO. 110-113, at 6 (2007).

293. *Id.*

294. *Id.*

295. Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 408–09 (1994) (arguing that three factors contribute to under-inclusive data: underreporting, difficulty determining motivations, and skewed subjective perceptions of those reporting).

296. See H.R. 1592, § 6(a); Weinstein, *supra* note 283, at 376–77.

297. Weinstein, *supra* note 283, at 378.

298. See Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & POL’Y 1, 9–11 (1994).

299. *Id.* at 11.

the victim through verbal insults.³⁰⁰ No doubt, many defendants would mount such a defense to penalty enhancement at trial, and such expression would remain protected under the holding of *R.A.V.*³⁰¹

The Supreme Court of Florida recognized this difficulty in interpreting Florida's bias-crime penalty enhancement law in *State v. Stalder*.³⁰² In *Stalder*, the court considered a First Amendment challenge to the Florida statute, which provided, "The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim."³⁰³ The court outlined the then recent decisions of the United States Supreme Court in *R.A.V.* and *Mitchell* and considered which was more applicable to the statute at issue.³⁰⁴ Because the Florida statute potentially proscribed two different kinds of conduct, the court concluded that the Florida statute contained elements similar to both the St. Paul ordinance struck down in *R.A.V.* and the Wisconsin penalty enhancement statute upheld in *Mitchell*.³⁰⁵ The statute proscribed crimes committed against a particular individual because of his membership in a particular group, punishing motive.³⁰⁶ *Mitchell* upheld this application because it essentially punished conduct—the selection of the victim.³⁰⁷ However, the statute also proscribed crimes where the defendant selected his victim based on neutral criteria such as anger or jealousy but exhibited bias in the manner in which he committed the crime.³⁰⁸ The defendant, for instance, may use a racial epithet during the actual commission.³⁰⁹ In that application, the statute proscribed only selected expression based on content in contravention of the rule in *R.A.V.*³¹⁰ Ultimately, the court saved the statute by limiting it only

300. *See id.* at 15.

301. *See supra* Part III.B.1.

302. *See State v. Stalder*, 630 So. 2d 1072, 1076 (Fla. 1994).

303. *Id.* at 1073–74 (quoting FLA. STAT. § 775.085(1) (1989)). In its essential nature the statute proves similar to the Hate Crimes Prevention Act. Compare H.R. 1592, § 6(a), with FLA. STAT. § 775.085(1) (1989).

304. *Id.* at 1074–75.

305. *Id.* at 1076.

306. *Id.*

307. *Id.*; see *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993).

308. *Stalder*, 630 So. 2d at 1076.

309. *Id.*

310. *Id.*; see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992).

to the former application.³¹¹ This case illustrates that the introduction of statements close in time to the criminal act may not be probative, and that certain applications of penalty enhancement statutes may run afoul of *R.A.V.*³¹²

In the context of the Hate Crimes Prevention Act, because proximate statements such as epithets may not be probative, the government would have to introduce further evidence to show the epithet signified selection based on sexual orientation and not merely a severe loss of temper.³¹³ To do this, the government will be forced to introduce evidence of more remote speech showing the defendant's history of homophobia or moral outrage against homosexuals. The fact that many crimes proscribed by the Hate Crimes Prevention Act may occur spontaneously and the fact that subjective motivation will often be difficult to prove, makes intrusive investigation into defendants' past statements likely. Therefore, the chilling effect is not merely conjectural or speculative as the Court held in *Mitchell*.³¹⁴ Ordinary people will have genuine reason to fear that their statements may be used against them in future prosecution. This substantial possibility is significant in light of the Court's heightened sensitivity to the chilling

311. *Stalder*, 630 So. 2d at 1076–77.

312. *Id.* at 1076.

313. Fleisher discussed a real life example of such a situation:

The defendant, Shannon Siegel, a white high-school student, attends a party at which he is intoxicated. He becomes angry and uses racial epithets when he sees the victim, who is black, speaking with his former girlfriend, who is white. He had already known that the two were seeing each other. The victim and the defendant had previously socialized together among a racially-mixed group of students. It was common for these students to use racial epithets when bantering with each other. The defendant's feelings of rage and humiliation intensify when a group of the guests forces him to leave because of his boorish conduct. Later that evening, the defendant, aided by four of his friends, stalks and brutally attacks the victim with a baseball bat.

Fleisher, *supra* note 298, at 14 (citing Michael Alexander, "I Never Hit Him," *Suspect in Ewell Attack Says Black Youth Was Friend*, *NEWSDAY* (N.Y.), Nov. 19, 1992, at 4). At trial, the central issue became whether the defendant had selected the victim based on race or whether his real motivation was jealousy and humiliation, making his use of racial epithets merely reflective of such emotion. *Id.* at 15. The issue was further complicated when the defendant's father testified that many of the defendant's close friends were black. *Id.* at 16. Weinstein also discussed an example of this situation: the defendant and his next door neighbor, a homosexual, finally came to blows after a series of disagreements about grass clippings left on the defendant's property, and over the course of the fight, the defendant called the neighbor a "faggot" and a "queer." Weinstein, *supra* note 283, at 382 (citing *In re Joshua H.*, 17 Cal. Rptr. 291, 293–94 (1993)). The issue was whether the defendant's predominant motivation was his neighbor's sexual orientation or anger over repeated disrespect for his property. *Id.*

314. See *supra* notes 110–13 and accompanying text.

effect in *Black*.³¹⁵

Recent state court decisions regarding statutes similar to House Bill 1592 demonstrate the extent to which prosecutors will delve into defendants' previous speech and associations to prove bias-motive. In *People v. Lindberg*, the California Supreme Court considered a First Amendment challenge to California's penalty enhancement statute.³¹⁶ The penalty enhancement at issue was different from that in *Mitchell* and House Bill 1592 in that it applied only to murder.³¹⁷ Nevertheless, the California statute applied the same basic concept by providing for an automatic sentence of either death or life in prison if the "victim was intentionally killed *because of* his or her race, color, religion, nationality, or country of origin."³¹⁸ The defendant in *Lindberg* repeatedly stabbed and murdered Thien Minh Ly, an Asian-American, at a high school tennis court.³¹⁹ To prove that the killing was racially motivated, the prosecution introduced masses of evidence that the defendant was an avowed white supremacist.³²⁰ The prosecution introduced a poster seized from the defendant's bedroom which read: "Celebrate Martin Luther King Day: If they would have shot four more, we could have had the rest of the week off from work."³²¹ In addition, the prosecution introduced numerous white supremacist publications found in the defendant's apartment.³²² Numerous witnesses testified and recounted bigoted speech that the defendant had used in the remote past.³²³ One witness testified that in the past, the "[d]efendant referred to Asians as 'gooks' and Hispanics as 'spick[s]'" and "wetbacks."³²⁴ The prosecution also introduced letters from years past in which the defendant made derogatory statements, such as "'Dog, its [sic] time to look in to the future this nation is comming [sic] to a hult [sic] with the niggers and us. We must choose sides now!'"³²⁵ The defendant's father also admitted that his son had a swastika tattoo.³²⁶ Thus, the

315. See *supra* notes 151–55 and accompanying text.

316. *People v. Lindberg*, 190 P.3d 664, 672 (Cal. 2008).

317. See CAL. PENAL CODE § 190.2(a)(16) (West 2008).

318. *Id.* (emphasis added).

319. *Lindberg*, 190 P.3d at 672.

320. *Id.* at 674–79. Ironically, the defendant himself was not white, but half Japanese and half Apache Indian. *Id.* at 679. This paradox may explain in part why prosecutors found it necessary to collect such an overwhelming amount of evidence as to the defendant's racial biases.

321. *Id.* at 674–75.

322. *Id.* at 675.

323. *Id.* at 677–79.

324. *Id.* at 677.

325. *Id.* at 678.

326. *Id.* at 679.

prosecution introduced protected speech that the defendant had engaged in over the period of his life to prove that the killing was racially motivated.³²⁷ Most of these communications had no close connection with the criminal act.³²⁸ Nevertheless, the court cursorily dismissed the defendant's First Amendment challenge to the introduction of this evidence by citing to *Mitchell*.³²⁹ The court tersely stated, "By its terms, this provision provides an enhanced penalty for first degree murder committed because of prohibited bias motivation and is not directed at free expression protected by the First Amendment."³³⁰ That brief disposal constituted the full extent of the court's First Amendment analysis.³³¹ Moreover, the dissenting opinion failed to even mention the First Amendment.³³² This decision has not yet produced notable commentary or controversy. Thus, the case is disturbing both for the amount of protected speech the prosecution introduced as evidence of motive and for the apparent complacency of the legal community. If prosecutions under such state penalty enhancement laws provide any indication of the potential use of prior speech as evidence, the chilling effect is real, not conjectural.

V. CONCLUSION

The Hate Crimes Prevention Act of 2007 poses crucial First Amendment problems. While not insuperable, these problems require more careful consideration than either the Court gave in *Mitchell* or proponents of the bill now give. While the opponents' fear that religious leaders who speak out against homosexuality may be subject to conspiracy or accomplice liability is misplaced,³³³ the potential gathering and introduction of evidence of a defendant's remote protected expression does pose a substantial danger of chilling.³³⁴ However, Congress can easily cure this potential danger through minor revisions. Above all, Congress must use more specific language to limit the potential use of protected speech as evidence. The rule of evidence provision stating that evidence must be "specifically related" to the

327. *See id.* at 674–79.

328. *See id.* at 676–79.

329. *Id.* at 692–93.

330. *Id.* at 692.

331. *See id.* at 692–93.

332. *See id.* at 704–06 (Kennard, J., dissenting).

333. *See supra* Part IV.B.

334. *See supra* Part IV.C.

crime is encouraging but incomplete.³³⁵ Loose construction of such language would render it largely meaningless for the purposes of mitigating the chilling effect.³³⁶ Rather, Congress should clarify that only speech that occurred during or immediately prior to the criminal act is admissible. This strict temporal limit on admissibility would vitiate any conceivable chilling effect. Even this minor change to the language of the proposed legislation substantially reduces the risk of chilling protected speech.³³⁷ In addition, the Supreme Court of the United States faces a more far-reaching defect in its First Amendment jurisprudence. The *Mitchell* decision conflates two unworkable theories as to why penalty enhancement statutes do not directly regulate speech based on content.³³⁸ This conflation has increased the danger that penalty enhancement will chill protected speech because the obscure, imprecise close nexus principle does not adequately guard protected speech remote from the substantive crime. In addition, penalty enhancement statutes run against the rule announced in *R.A.V.* by essentially punishing unfavorable speech.³³⁹ The Court might be better advised to reformulate its jurisprudence and hold that such restrictions on speech are acceptable because they are narrowly tailored to serve a compelling state interest—avoiding the social disintegration that occurs as a result of hate speech. Punishing only that expression actually directed at the victim would vitiate the necessity of introducing remote speech as evidence at trial.

335. See H.R. 1592, § 6(a).

336. See *supra* Part IV.C.

337. For instance, the drafters could alter the rule of evidence provision as follows: In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the expression or association is immediately related temporally, spatially, and causally to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.

338. See *supra* Part IV.A.

339. See *supra* notes 179, 198 and accompanying text.

